TAN AH TONG

v.

DATO' SERI DR KULJIT SINGH

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[BANKRUPTCY NO: 29-1311-1997]
2 JANUARY 2002

BANKRUPTCY: *Notice - Service of - Effective date - Whether to consider bankruptcy notice or amended bankruptcy notice - Petition - Validity of creditor's petition - Limitation - Whether creditor's petition presented beyond six months period - Bankruptcy Act 1967, s. 5(1)(c) - Whether in breach thereof*

BANKRUPTCY: *Notice - Setting aside - Bankruptcy notice and amended bankruptcy notice - Whether rendered null and void due to inclusion of illegal and unenforceable interests - Whether such interests were statute barred - Limitation Act 1953, s. 6(3)*

The judgment creditor ('JC') had served a bankruptcy notice on the judgment debtor ('JD') on 28 August 1997. The said notice had wrongly stated the JD's identification card number. It was accordingly amended and served on the JD on 5 May 1998. Subsequently, the JC served a creditor's petition on the JD on 13 July 1998. The senior assistant registrar ('SAR') granted the JD's application to set aside bankruptcy notice and the amended bankruptcy notice, and to strike out the creditor's petition with costs, contending that the creditor's petition was in breach of s. 5(1) of the Bankruptcy Act 1967 ('the BA').

This was an appeal by the JC against the decision of the SAR.

Held:

[1] An amended document does not completely negate or cancel out the principal document that it purports to amend. It is predicated upon the prevailing existence, reality and validity of the principal document save as to extent or portion amended. (p 489 c-d)

[2] Section 5(1)(c) of the BA provides that a bankruptcy petition could only be presented where the act of bankruptcy cited in the said petition has occurred within six months before the presentation of the said petition. (p 488 e-f)

[2a] For the purpose of pegging the act of bankruptcy in the present case, the service of the bankruptcy notice, and not the amended bankruptcy notice, should be the governing document. Therefore, in concluding that the act of bankruptcy was committed on 5 September 1997, the creditor's petition was presented outside the six months period, rendering it invalid and should be struck out. (p 489 f-g)

[2b] A bankruptcy action is a form of execution proceedings. In light of the present facts, a further complication arose in that since the JC had obtained leave to execute under O. 46 r. 2(1) of the Rules of the High Court 1980, the bankruptcy notice dated 6 June 1997 would be within the one-year period whereas the amended bankruptcy notice ordered on 15 October 1997 would fall out of the period and run foul of O. 46 r. 2(3). (p 489 h)

[3] Under s. 6(3) of the Limitation Act 1965, a JC is barred from claiming in excess of 6 years interest on the judgment sum. By including further interest for the period 22 September 1992 to 4 June 1997 which was statute barred, the bankruptcy notice and the amended bankruptcy notice was wholly tainted so as to render their issuance not in accordance with the terms of the judgment or order. As the said notices were null and *void ab initio*, the JD's failure to comply with them did not constitute an act of bankruptcy. This meant that the creditor's petition founded on the amended bankruptcy notice must also fail. (p 491 d-f)

[Judgment creditor's appeal dismissed with costs.]

Case(s) referred to:

Arunachalam, Re ex p Indian Overseas Bank Ltd [1968] 1 MLJ 89 ***(refd)***

BBMB Factoring Bhd v. Mariam Sasiman & Anor Appeal [2000] 3 CLJ 639 ***(refd)***

J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd [2000] 3 CLJ 104 ***(refd)***

Low Mun v. Chung Khiaw Bank Ltd [1988] 1 MLJ 263 ***(refd)***

Hj Ahmad Lazim & Ors, ex p Bank Kerjasama Rakyat (M) Bhd [1999] 2 CLJ 101 ***(refd)***

Re Lim Ah Hee & Sim Ah Hee; ex p Perwira Affin Bank Bhd [2000] 3 CLJ 354 ***(foll)***

Re Mohd Tajuddin Mohd Jali, ex p Perwira Habib Bank Malaysia Bhd [2000] 5 CLJ 526 ***(refd)***

Re Ngan Chin Wen, ex p Moscow Narodny Bank Ltd [1996] 2 CLJ 943 ***(refd)***

Re Ti Hock Soon, ex p Perwira Habib Bank Malaysia Bhd dan Dua Lagi Kes [1993] 1 CLJ 477 ***(refd)***

United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin [2000] 2 MLJ 31 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 3(1)(i), (2)(ii), 5(1)(c), 93(3), 131
Bankruptcy Rules 1969, r. 94(1)(aa)
Limitation Act 1953, s. 6(3)
Rules of the High Court 1980, O. 18 r. 19, O. 46 rr. 2(1), 2(3)

Other source(s) referred to:
GK Ganesan, *Bankruptcy Law in Malaysia and Singapore*, Marsden Law Book Company, edn 2001, p 314

For the appellant/judgment creditor - Moses Susayan; M/s A Ramiah & Partners
For the respondent/judgment debtor - NY Ngeow (Keshminder Singh); M/s Thomas, Philip, Kwa & Lou

Reported by M Maheswaran

JUDGMENT

Vincent Ng J:
Despite the relatively paltry amount involved, the saga of this contest between the two abovenamed characters has persisted to vex various judges in various courts for well over 15 years past. I thought I would have the privilege of seeing the closing chapter of this saga, but that was not to be; as with this appeal against my decision on 12 December 2001, this saga is ill-willed to continue, as though the courts have nothing better to engage their minds on. I regret to have to observe that this was in part brought about by the manner in which the judgment creditor's (JC's) solicitors have handled the various and varied execution processes. Considering the chequered track record of the parties herein I am fairly certain that after a further umpteen years from now, God willing (in terms of the gift of tenacious genes), the eventual question of costs incurred in the whole saga would be fought out in similar tenacious style at all levels of the courts *ad infinitum* and *ad nauseum*. My sympathies are with the JC. But as the bounden duty that flows from a judge's oath of office is to decide a case, not viscerally or through sheer flexing of judicial muscle or fine choice of words, but on the basis of arguably impartial and rigorous analysis of the law, sympathy is the only extraneous outcome of the case that this court could legitimately impart. When, to satisfy my nagging curiosity, I enquired as to whether they have aided and abetted pettifogging the current solicitors on both sides of the divide happily assured me that they have been adequately paid for their services.

On 22 September 1986 the JC and judgment debtor (JD) herein entered a consent judgment in the sum of RM35,632 in a matter pertaining to sale of land in Suit No. F27 of 1979. The consent judgment was recorded before Siti Norma Yaacob, J (as she then was). Unfortunately, the consensual nature of the judgment was destined not to translate to action when it came to paying

even a dollar to account of the judgment sum. Based on the consent judgment, the JC instituted bankruptcy proceedings under Bankruptcy No: D4-29-1968-91. Whilst the bankruptcy proceedings was in progress, JD applied by way of a fresh writ No: S1-23-579-93 to set aside the said consent judgment, which resulted in the JC applying under O. 18 r. 19 to strike out the JD's writ. The JC was successful both before the senior assistant registrar and also in the appeal by the JD before KC Vohrah J (as he then was) on 29 August 1995. However, the Bankruptcy Notice No. D4-29-1968-91 was struck off due to bad service. Thereafter, a fresh bankruptcy notice was filed but was promptly withdrawn as the time-period for execution on the consent judgment had then expired. And, in the alternative, the JC applied for and obtained leave to execute on the consent judgment. The said order for leave to execute was dated 26 September 1996. Again the JD tried to set aside the order for leave to execute but the application to set aside was dismissed on 12 March 1997.

Having obtained the leave to execute, the JC then attempted to execute on the consent judgment by way of writ of seizure and Sale No: 37-103-96. This too was withdrawn by a filing of notice of discontinuance dated 26 May 1997 when the JC belatedly discovered to his utter surprise that the assets were not in the ownership of the JD.

Yet again a Bankruptcy Notice No: 29-1311-97 ('the BN') was filed on 6 June 1997 and served on JD on 28 August 1997. However, it was only after service of the BN that the solicitors became aware that the National Registration Identity Card Number (NRIC number) of the JD was wrongly stated in the BN. This led the solicitors to file an *ex parte* application to amend the bankruptcy notice. Order in terms of the *ex parte* application was obtained on 15 October 1997 and an amended bankruptcy notice ('ABN') was filed and issued by the court on 28 November 1997 and served on JD on 5 May 1998 by personal service. At this juncture it is pertinent to note that the BN was quite rightly amended to include the NRIC number of the JD pursuant to s. 93(3) read with s. 131 of the Act. On 13 July 1998 the creditor's petition ('CP') was served on the JD. This was resisted by the JD, who filed a summons-in-chambers dated 5 September 1998 supported by his affidavit affirmed on 4 September 1998, and he further served a notice of debtor's intention to oppose petition dated 4 September 1998.

This appeal is by the JC against the decision of the SAR on 23 February 1999 setting aside the BN and ABN and striking out the creditor's petition dated 29 May 1998 with costs.

In the appeal before me the parties narrowed down the argument to only two issues for adjudication as follows:

(1) Whether the date of the act of bankruptcy on which the CP was grounded should be pegged on the basis of service of the BN or the ABN – since if it is based on the service of the BN the act of bankruptcy would have occurred more than June months before the presentation of the CP and it would run foul of s. 5(1) of the Act.

(2) Whether the BN and ABN is bad in law and thereby null and void due to the inclusion of illegal and unenforceable interests which was statute barred by s. 6(3) of the Limitation Act 1953.

On The First Issue

The BN was issued on 6 June 1997 and served on the JD on 28 August 1997. Thus, based on the service of this BN the act of bankruptcy occurred on 5 September 1997 by virtue of s. 3(1)(i) of the Act. Whereas, the ABN was served on the JD on 5 May 1998, and if this date is taken (as the JD had contended) then the act of bankruptcy would have occurred on 13 May 1998. The CP was presented and issued on 29 May 1998 and served on the JD on 13 July 1998. The JD's argument on this issue is that if the act of bankruptcy occurred on 5 September 1997 the presentation of the CP on 29 May 1998 runs foul of s. 5(1)(c) of the Act which reads:

> 5.(1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless:
>
> (a) …
>
> (b) …
>
> (c) the act of bankruptcy on which the **petition is grounded** has occurred within six months **before** the presentation of the petition. (emphasis added)

The requirement of section 5(1)(c) is two-fold:

(a) the CP must state only one act of bankruptcy committed by the JD although JD could have committed several Acts of Bankruptcy based on several bankruptcy notices as there is nothing wrong for a judgment creditor to issue repeated bankruptcy notices under new bankruptcy proceeding numbers after abandoning a preceding bankruptcy notice. On this topic GK Ganesan, in his opus '*Bankruptcy Law in Malaysia and Singapore*' Marsden Law Book Company (edn 2001) at p. 314 had this to say:

> In *The Law and Practice in Bankruptcy* by Williams and Muir Hunder (19th Ed) at p. 1, the learned authors, in explaining the provision of s. 4(c) of the English Act, which is *in pari materia* with the Malaysian s. 5(1)(c) – except that under the English Act the period is three months instead of six months – state:

> The commission by the debtor of at least one act of bankruptcy is the fact which gives the bankruptcy court jurisdiction to make a receiving order in respect of his estate, and is to be treated as a statutory recognition of his insolvency. Such an act of bankruptcy must be proved to have been committed within three months before the presentation of the petition …, and any act so proved must be recited in the receiving order.'

(b) The particular 'one' act of bankruptcy stated in the petition must have occurred within six months prior to the date of filing of the CP (the calculation of the time period of six months runs backwards from the date of filing of the CP to determine if the particular act of bankruptcy falls within six months).

The particular act of bankruptcy due to non-compliance of the ABN was stated in the CP as having occurred on 13 May 1998. Logically, in my view an amended document (such as the ABN here) does not negate completely or cancel out the principal document that it purports to amend. Essentially, an amended document is predicated upon the prevailing existence, reality and validity of the principal document save as to the extent (or portion) amended. To hold otherwise would be tantamount to holding, for example, that an amended writ of summons cancels out the original writ. Such an approach would lead to a patent absurdity. In the case at hand it is pertinent to note that the amendment is only confined to the inclusion of the NRIC number of the JD in order to comply with r. 94(1)(aa) of the Bankruptcy Rules 1969.

There were no legal impediments then (of course, not now) to the JC filing a fresh bankruptcy notice (see *Hj Ahmad Lazim & Ors, ex p Bank Kerjasama Rakyat (M) Bhd* [1999] 2 CLJ 101). Yet he chose not to adopt that course of action without realising that an amended bankruptcy notice under the same bankruptcy file number would not constitute a fresh bankruptcy notice by any stretch of reasoning. As such, I would hold that for the purpose of pegging the act of bankruptcy in the present case, the service of the BN and not the ABN should be the governing document. And, consequently, since the act of bankruptcy (upon expiry of the seven days' grace period) was committed on 5 September 1997, the CP was presented outside the six months' period and is invalid and should be struck out.

A further complication would be that since the JC obtained leave on 26 September 1996 to execute under O. 46 r. 2(1) of the Rules of High Court 1980 (RHC), the BN dated 6 June 1997 would be within the one-year period whereas the ABN ordered on 15 October 1997 would fall out of the period and run foul of O. 46 r. 2(3). To be noted is that bankruptcy action is a form of execution proceedings. See *Re Lim Ah Hee, ex p Perwira Affin Bank Bhd* [1997] 4 CLJ 462 at 467. In any event, the Rules Committee, in introducing

this provision could not have intended the caveat on recovery after the six years post-judgment to apply only to execution other than bankruptcy proceedings and allow a judgment creditor unlimited time of even say 12 years post-judgment to commence bankruptcy proceedings without leave. Obviously, the six year rule is intended to discourage the judgment creditor – who is expected to act with vigour to recover the fruits of litigation – from holding the Sword of Damocles over the head of the judgment debtor for an indefinite and inordinate number of years. This must be so as a bankruptcy action being an execution *in personam* is by far a more impactful and traumatic event (entailing a gamut of personal restrictions) on the judgment debtor than an execution in rem against his property.

Before I deal with the second issue I would first have to consider whether, since the JD did not give notice of dispute of the validity of the BN under s. 3(2)(ii) of the Bankruptcy Act, he is debarred from pursuing his second point. It is now settled by high authority that s. 3(2)(ii) is only applicable to cases where the bankruptcy notice mistakenly claimed more than what is actually due, for example, because there was part payment which the notice did not give credit as in *Arunachalam, Re ex p Indian Overseas Bank Ltd* [1968] 1 MLJ 89. This is not a jurisdictional challenge. But where the bankruptcy notice requires the judgment debtor to pay an amount which is not in accordance with the terms of the judgment on which it is founded or to pay a sum which includes an illegal or statute barred amount then it attracts a jurisdictional challenge which falls outside the scope of proviso (ii) to s. 3(2). This view is wholly consistent with sound reasoning as, in order to invoke the bankruptcy court's jurisdiction a judgment creditor is obliged first to comply with the Bankruptcy Act 1967, and s. 3(1)(i) requires the bankruptcy notice to state the sum to be paid (by the judgment debtor) "in accordance with the terms of the judgment or order" as at the date of the bankruptcy notice. See *Low Mun v. Chung Khiaw Bank Ltd* [1988] 1 MLJ 263, *J Raju a/l M Kerpaya v. Commerce International Merchant Bankers Bhd* [2000] 3 CLJ 104 and also *Re Ngan Ching Wen* [1996] 2 CLJ 943.

For the above reasons, I hold that the JD's second challenge is extant and properly before me for decision, as s. 3(2)(ii) is inapplicable and it is not a procedural but a jurisdictional challenge and on law.

The BN and the ABN gave the following breakdown of the gross sum that the JD was required to settle:

(a) Consent judgment in the sum of RM35,632;

(b) Interest until the date of judgment (22 September 1986) – RM20,521.80;

(c) Interest from 23 September 1986 to 4 June 1997 – RM29,273.40 (being the aggregate of RM17,103.36 interest for six years from 23 September 1986 to 22 September 1992 and RM12,170.04 interest from 22 September 1992 to 4 June 1997)

Confronted with the reality of those figures in the BN and ABN staring at him counsel for the JC could not but concede that an excess sum of RM12,170.04 was demanded as interest beyond the six years' period post-judgment. Thus the JC is caught on the wrong side of the ratio in *Re Lim Ah Hee & Sim Ah Hee; ex p Perwira Affin Bank Bhd* [2000] 3 CLJ 354 – a Court of Appeal decision which I am bound to follow. In *Lim Ah Hee* it was held that s. 6(3) of the Limitation Act 1953 bars judgment creditor from claiming in excess of six years interest on the judgment sum, and this point is a point of law which the judgment debtor could raise at any time. This ratio was affirmed by the same court (with a different panel) in *United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin* [2000] 2 MLJ 31 (see also *Re Ngan Chin Wen, ex p Moscow Narodny Bank Ltd* [1996] 2 CLJ 943 and *Re Mohd Tajuddin Mohd Jali, ex p Perwira Habib Bank Malaysia Bhd* [2000] 5 CLJ 526.

Applying the above trite principle to the instant case, the inclusion of the further interest of RM12,170.04 for the period from 22 September 1992 to 4 June 1997 which is statute barred has so tainted the whole BN and ABN as to cause both the notices to be issued not 'in accordance with the terms of the judgment or order'. Consequently, applying the rule of strict construction, both the BN and ABN cannot be held to fall within s. 3(1)(i) of the Bankruptcy Act – both being null and *void ab initio* – and the JD's failure to comply with the notices did not constitute an act of bankruptcy. It would follow that the CP founded on the ABN must necessarily fail. In the event the JC's appeal against the senior assistant registrar's decision is dismissed with costs to the JD. And, considering the very longstanding nature of this running saga between the JC and JD detailed in the preamble above, it is not proper for this court to exercise any of its discretion under ss. 92(1) or 93(3) of the Act however wide such discretion is held to be (see *BBMB Factoring Bhd v. Mariam Sasiman & Anor Appeal* [2000] 3 CLJ 639 at p. 643 and *Re Ti Hock Soon, ex p Perwira Habib Bank Malaysia Bhd dan Dua Lagi Kes* [1993] 1 CLJ 477).